No. 87-6116

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STEVEN ANTHONY PENSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF
MONTGOMERY COUNTY, OHIO

BRIEF FOR RESPONDENT

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I.

QUESTIONS PRESENTED:

I. CAN THE PETITIONER ESTABLISH HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHERE HE HAS FAILED TO POINT TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT?

II. IS AN ALLEGED CONSTITUTIONAL VIOLATION WHICH IS BASED UPON THE FILING OF AN INADEQUATE *ANDERS* BRIEF BY COURT-APPOINTED COUNSEL ON DIRECT APPEAL SUBJECT TO HARMLESS ERROR ANALYSIS PURSUANT TO *CHAPMAN* V. *CALIFORNIA*, 386 U.S. 18 (1967)?

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STATEMENT OF THE CASE

On August 10, 1984, Petitioner was indicted by the Montgomery County Grand Jury on one (1) count of Rape, pursuant to Ohio Revised Code (hereinafter referred to as "R.C.") 2907.02(A)(1), with a firearm specification, pursuant to R.C. 2929.71 and 2941.141 (Joint Appendix, hereinafter refered to as "J.A.", p. 2-3). On August 14, 1984, the grand jury indicted Petitioner on twenty (20) additional counts of Rape, each count containing a firearm specification; one (1) count of Aggravated Burglary, pursuant to R.C. 2911.11(A)(3), with a firearm specification; two (2) counts of Aggravated Robbery, pursuant to R.C. 2911.01(A)(1), each

count containing a firearm specification; two (2) counts of Felonious Assault, pursuant to R.C. 2903.11(A)(2), each count containing a firearm specification; one (1) count of Felonious Sexual Penetration, pursuant to R.C. 2907.12(A)(1) and 2923.02, with a firearm specification; and one (1) count of Gross Sexual Imposition, pursuant to R.C. 2907.05(A)(1), with a firearm specification (J.A., p. 4-23). On August 21, 1984, the grand jury added prior aggravated felony conviction specifications to each count of Petitioner's previous indictments and further indicted Petitioner on one count of Having Weapons While Under Disability, in violation of R.C. 2923.13(A)(2), with said count containing a firearm specification and a prior aggravated felony conviction specification (J.A., p. 24-32). Petitioner was tried jointly with co-defendants John A. Smith, Jr. and Richard Brooks, before a jury on November 26 through December 5, 1984. On December 7, 1984, the jury returned verdicts finding Petitioner guilty on fourteen counts of Rape with firearm specifications on each count; guilty of Aggravated Burglary with a firearm specification; guilty of two counts of Aggravated Robbery with firearm specifications on each count; guilty of two counts of Felonious Assault with firearm specifications on each count; guilty of Attempted Rape with a firearm specification; guilty of Gross Sexual Imposition with a firearm specification; and guilty of Having Weapons While Under Disability with a firearm specification. Except for Counts Five and Six, each count of which Petitioner was convicted contained a finding that he had previously been convicted of Felonious Assault (Docket Entry #24).

On December 27, 1984, the trial court filed an entry and order sentencing Petitioner to Chillicothe Correctional Institute for a term of not less than fifteen (15) years nor more than twenty-five (25) years on counts one through four, ten through seventeen and twenty-two through twenty-six; not less than twelve (12) years nor more than fifteen (15) years on counts five, six and eight; and not less than three (3) years nor more than five (5) years on count twenty-nine. On Count

Two there is an additional term of three (3) years actual incarceration for the firearm specification, which shall be served consecutively with, and prior to, all other terms of imprisonment. All other sentences are to be served concurrently with each other and all sentences are to be served consecutively with the sentence imposed in Case No. 84-CR-1056. An amended entry and order was filed on January 9, 1985 to state that all sentences pertaining to the rape counts were to be served as actual incarceration. (J.A., p. 33-34).

Petitioner timely filed his Notice of Appeal from his judgment and sentence (Docket Entries #31 and #32). Petitioner's appellate counsel filed an *Anders* brief in the Montgomery County Court of Appeals on June 2, 1986, stating that there were no meritorious issues to be raised on appeal. (J.A., p. 35-36). On June 9, 1986, Douglas Shaeffer was permitted to withdraw as appellate counsel for Petitioner and the Petitioner was allowed 30 days to file his own brief. (J.A., p. 37). Although several extensions of time were granted allowing Petitioner additional time to file his brief, no brief was ever filed.

After reviewing and deciding the appeals filed by co-defendants Richard Brooks, unreported, Montgomery App. No. 9190 (June 4, 1987) and John A. Smith, Jr., unreported, Montgomery App. No. 9168 (May 13, 1987), the Montgomery County Court of Appeals, pursuant to its duties under *Anders* v. *California*, 386 U.S. 738 (1967), undertook a full examination of the record to determine whether the Petitioner received a fair trial and whether any grave or prejudicial errors occurred during the trial. The Court of Appeals stated in its Opinion that the record did support several arguable claims which were fully considered in the appeals of the co-defendants, Brooks and Smith. *State* v. *Steven Anthony Penson*, unreported, Montgomery App. No. 9193, (June 5, 1987), J.A., p. 40-41. Based upon its review of the record and consideration of the issues raised in the appeals of the co-

defendants, the Court of Appeals reversed Petitioner's conviction for Felonious Assault as charged in Count Six of the indictment and affirmed his conviction on the other counts (J.A., p. 42-43).

Petitioner filed his Notice of Appeal to the Ohio Supreme Court on July 6, 1987. On October 21, 1987, the Ohio Supreme Court filed an Entry dismissing Petitioner's appeal for want of a substantial constitutional question. The petition for writ of certiorari filed herein was granted by this Honorable Court on February 22, 1988. (J.A., p. 47).

On August 4, 1984, James Jones and his wife, Deborah Jones, and their two children were living at 1947 Fairport Avenue, Apartment 104, in Montgomery County, Ohio. Residing with them at that time was James' sister, Mary Jones, and her son (Trial transcript, hereinafter "T. Tr.", at 200-01; 215). Although they had no electric service in their apartment at that time, a nearby street lamp and two other overhead lamps on a church and school across the street provided light inside the apartment (T. Tr. 200-03). At around 3:00 a.m. that morning, a man whom James knew as Steve Penson, crashed through their bedroom window knocking down the blind as he came in (T. Tr. 204; 250). James testified at trial that he had known Penson since about March 1984 and had seen him about 15 to 20 times prior to August 4, 1984 (T. Tr. 197-98).

James further testified that Penson had a pistol and ordered him and Deborah to freeze. Penson then said to James, "Yes, mother fucker, you thought I wasn't coming, didn't you? I have been over here before and you should have had enough sense to move out of here." (T. Tr. 204). Penson then pointed the gun at James' head and ordered him to sit down. After James sat down Penson kicked him in the chin. Penson asked James where the money was, to which James replied that he had no money but did have some food stamps in his jacket. Penson told him not to try anything tricky and went over to where the jacket was and took the food stamps. At that time,

two men later identified as Richard Brooks and John Albert Smith, Jr. kicked in the front door of the apartment and came inside (T. Tr. 204-05).

James Jones stated that he had known Brooks since about June 1984 and had seen him at least ten times prior to August 4, 1984. While he did not know John Smith by name on August 4, 1984, James stated that he had seen Smith in the neighborhood on two or three occasions prior to that time (T. Tr. 199-200).

After Brooks and Smith entered the apartment they came back to the bedroom and Penson went into the living room. Brooks and Smith made Deborah come out of the bedroom closet and Smith, who was holding a gun on James, said to Deborah, "Take off your clothes, bitch, I am going to fuck you." Brooks had a knife at that time and Smith handed the gun to Brooks. Smith then said, "Yes, mother fucker, I am going to fuck your wife right in front of your face" and proceeded to have sex with Deborah on the floor (T. Tr. 206). While this was going on, Brooks held the gun to James' head and demanded money. When James told him that Penson already had the money, Brooks called him a liar and hit him in the head several times with the end of the pistol. Brooks then made James get down on the floor and crawl while telling him, "Mother fucker, you are going to die, this is it, this is the day you are going to die." (T. Tr. 206-07). During this time, James stated that he could hear his sister in the living room pleading with Penson not to hurt her child.

After Smith finished raping Deborah and got up he said to her, "Hey, I want you to suck my dick and get a come off it." (T. Tr. 207-08). Deborah complied with Smith's demand and then she was raped by Brooks. Brooks first told her, "Suck it, bitch." After doing as he ordered, Deborah was then raped vaginally by Brooks. As Brooks was doing this to Deborah, Smith held the gun on James and said, "Tell your wife what kind of nigger you are. Tell her you ate shit, you punk mother fucker. You are a fag." Smith then hit James several times in the head with the gun (T. Tr. 208).

During this time Penson came back into the room. As Deborah exclaimed, "Jesus, Jesus", Penson said to her, "Jesus, he wasn't going to help you now, bitch. You are getting ready to die" (T. Tr. 208-09). Penson then commented that they were not going to leave any witnesses because he thought that James and Deborah would go to the police. Penson then went over to Deborah and forced her to commit fellatio on him at the same time that she was having anal intercourse with Brooks. James heard Penson tell Deborah, "Yes, bitch, if you bit it I am going to blow your head off." When Penson finished he told Deborah, "You don't even know how to get no head" and he then kicked her in the side of the head. After that, Smith came back over and said, "Yes I am going to get me some of this. I am going to fuck you in your ass, bitch." Smith then proceeded to have anal sex with Deborah. As this was happening, Penson came over to where James was lying face down on the floor, stepped on his buttocks and then urinated on James' back. Penson then took the pistol he was holding and pressed the barrel up against James' rectum while telling him, "I ought to blow your nuts right off you." (T. Tr. 209-10).

After Smith finished raping Deborah, Penson went over and raped her vaginally. Penson said to her, "You have got good titties and you have got good pussy but you don't know how to give no head." Penson then turned Deborah over and had anal intercourse with her. At the same time that Penson was having anal sex with Deborah, Smith came over and made her commit fellatio upon him. After Smith was finished, he came over to where James was and either urinated or dripped sperm on his back. At that time Brooks came back into the room while Penson left the room. Brooks threatened to kill James and hit him in the side of the head a couple of times with the pistol he was holding. Brooks then said to James, "Yes, I ought to fuck you in your ass, where is the grease at, mother fucker." James replied that he did not know where any grease was. Smith then got on top of James while holding a gun to the back of his head and tried to insert his

penis into James' rectum (T. Tr. 210-12; 215-16). After that, Brooks began raping Deborah again while at the same time sticking the barrel of the pistol he was holding up against James' testicles and telling him, "I'll blow your nuts off." (T. Tr. 212).

After that, Penson came back into the room and again stated his intention to leave no witnesses. Smith had gone back into the living room with Mary and James could hear her crying. James then heard Brooks say to Deborah, "Give me some more head" after which she was forced to commit fellatio on Brooks (T. Tr. 212). Penson then struck James several more times on the side of the head with the pistol and again threatened to kill him. After that, Penson once again forced Deborah to perform fellatio upon him. When asked why they were committing these acts, Penson indicated that he blamed James for a criminal charge of carrying a concealed weapon that he was facing (T. Tr. 212-13). At this point, James saw his sister go back to the bathroom with Smith and heard the shower cut on. Penson and Brooks then ordered Deborah to get on the bed with James and they forced her to perform fellatio upon James (T. Tr. 248). Deborah was then taken into the bathroom and forced to take a shower. While Deborah was in the shower, Penson again hit James in the head with the pistol.

After Deborah came out of the shower, she was told to lay face down on the bed with James. Penson then told Brooks to kill James and Deborah after which Penson and Smith left the room. Brooks then said, "Yes, this is it, mother fucker. You are going to die. You are going to die." Then, for some unexplained reason, Brooks said, "I couldn't kill you." Brooks then told them to count to two thousand and he left the apartment (T. Tr. 213-14).

At this point in James Jones' testimony all three defendants, by counsel, stipulated that none of the defendants was the spouse of James, Deborah or Mary Jones (T. Tr. 214-15).

James testified that the defendants took several items from the apartment, including his duffel bag, a cassette player, a flashlight, Deborah's identification cards, and some items they had recently purchased from Sears (T. Tr. 216). James also stated that he saw two guns and a knife in the possession of the defendants and that he did not consent nor did he hear Deborah consent to any of the sexual acts perpetrated upon them (T. Tr. 216-17). James further noted that he had no trouble seeing under the lighting conditions that existed in the apartment during the course of these acts and that he was one hundred percent positive that Steve Penson, Richard Brooks and John Albert Smith, Jr., were the three men in the apartment who committed the acts (T. Tr. 218-19).

On cross-examination, James was asked whether he ever heard his wife yell or scream during the incidents. James replied that Deborah did scream at one point and that Penson told her, "Bitch, you better shut up and you ain't going to start screaming or I am going to blow your fucking head off." (T. Tr. 251).

Dr. Don E. Gregory testified that he examined Deborah and Mary Jones in the early morning hours of August 4, 1984, sometime between 4:00 a.m. and 6:00 a.m., at Good Samaritan Hospital (T. Tr. 356). Dr. Gregory stated that his examination of Mary Jones revealed no obvious external signs of trauma and no physical problems except in the pelvic area where she had a long superficial laceration on the vulva. The laceration measured about one-half inch in length, was still fresh and oozing and was obviously less than four to six hours old (T. Tr. 357; 361).

When he examined Deborah Jones, Dr. Gregory noted that she was crying and very distraught. Deborah told him that she had been raped by several men. Dr. Gregory's physical examination of Deborah revealed numerous bruises over her body including five separate bruised areas over her upper chest and neck and two large bruised areas on her back. His pelvic examination of Deborah disclosed five separate one-

half centimeter lacerations scattered over the vulva and the internal genital area. In the rectal area there were two small lacerations noted in the skin over the entrance to the rectum. A specimen obtained from the vaginal wall noted the presence of non-motile sperm. Dr. Gregory stated that the presence of non-motile sperm indicated that it was deposited somewhere between one-half and four hours before (T. Tr. 357-59).

Dr. Gregory stated that his opinion, to a reasonable degree of medical certainty, was that both Deborah and Mary's injuries were consistent with forceful intercourse and their statements made to him that they had been raped. In Dr. Gregory's opinion, these injuries were inconsistent with consensual intercourse (T. Tr. 359-60).

Mary Jones testified that she had been sleeping in the living room of her brother's apartment during the early morning hours of August 4, 1984 when she was awakened by John Smith. Mary stated that she did not know Smith prior to that time but she was able to positively identify him in court (T. Tr. 389-91). Mary explained that a light which was shining through a living room window provided sufficient illumination to enable her to see things and people in the room (T. Tr. 391). Mary complied with Smith's demand that she remove her clothes. Smith then left the room and Penson came in. Although Mary did not know Penson beforehand, she positively identified him in court (T. Tr. 392). Mary begged Penson not to hurt her or her son and Penson asked her what she would do to keep that from happening. Mary told Penson she would do what he wanted and Penson told her to unzip his pants (T. Tr. 392). Mary stated that after she unzipped his pants, Penson ordered her to suck his penis and said, "If you bite me I will kill you." After complying with Penson's demand, Mary was ordered to lay on top of Penson and he proceeded to have vaginal intercourse with her. As she was lying on top of Penson, another man whom she could not see came up from behind and had anal intercourse with her (T. Tr. 392-93). When the other man finished raping her anally, he

went back into the bedroom. Penson then told her to lay face down and he had anal intercourse with her (T. Tr. 393). Mary then went into the bathroom and was getting ready to take a shower when Smith came in and said, "I am not finished with you yet." Smith brought her back into the living room and forced her to get down on her knees and commit fellatio on him. He then had vaginal and anal intercourse with her (T. Tr. 393-95). Smith then took Mary into the bathroom and forced her to take a shower while he watched (T. Tr. 395-96).

Mary further testified that she saw one of the men carrying a bag with him when they left and that some of her property was missing including her car keys, five dollars in cash and some clothes (T. Tr. 403-04). Mary stated that she was not able to positively identify Brooks as one of the men there but she was able to positively identify Penson and Smith because of the close face-to-face contact she had with them during the rapes and because of their close proximity during the rapes to the window which allowed the outside light to come in (T. Tr. 397-98; 426-28).

Ronald Brandenburg, an evidence technician with the Miami Valley Regional Crime Lab, testified with regard to some fingerprints which he was able to get from a fishbowl in the bedroom of the Jones apartment (T. Tr. 437-39). Detective Jim Locker, a latent print examiner with the Dayton Police Department, testified regarding his examination and comparison of the prints with the known prints of Steve Penson and stated his opinion that the prints lifted from the fishbowl were those of Steve Penson to the exclusion of all other persons (State's Exhibits 9 through 11; T. Tr. 447-50).

Dr. Carl M. Ferraro testified regarding his examination and treatment of James Jones at Good Samaritan Hospital on August 4, 1984. Dr. Ferraro stated that he saw James around 5:00 a.m. that morning and that James had approximately ten to twelve lacerations on the left side of the head ranging from a few millimeters to about one inch in length. Dr. Ferraro noted that he used 36 stitches to close the lacerations (T. Tr. 456-58).

Deborah Jones testified that in the early morning hours of August 4, 1984 she was rolling her hair in the bedroom of their apartment. She was using a mirror to roll her hair and the outside lights coupled with a candle and flashlight in the bedroom provided sufficient illumination to accomplish that task (T. Tr. 474-78). As she was doing that, she saw Penson come through the bedroom window with a gun in his hand. Deborah stated that Penson was cursing at James and mentioned something about James owing him money (T. Tr. 478-81). Deborah stated that she had known Penson previously and she identified him in court (T. Tr. 481-82). She also stated that she had never seen Brooks or Smith prior to this time (T. Tr. 482).

Deborah's testimony essentially corroborated that of her husband concerning the events that transpired in their bedroom. She stated that Smith forced her to take her robe off and threw her on the bed. Smith then raped her vaginally after which he forced his penis into her mouth. After Smith forced her to perform fellatio on him, he went over and helped the others beat on James. She stated that the defendants were making James watch what they were doing to her (T. Tr. 483-85).

After Smith left her, Brooks came over and made her commit fellatio on him, telling Deborah that he would not let them hurt her as long as she did what she was told. Brooks then made her get on top of him and had intercourse with her. While she was on top of Brooks, Penson kicked her in the head and then forced his penis into her mouth. After Brooks had intercourse with her, he made her commit fellatio on him. Brooks later came back over to Deborah and made her sit on top of him again with his penis in her vagina. While this was going on, Penson came back over and held a gun to her head while he inserted his penis into her rectum (T. Tr. 485-89). Deborah also observed Smith getting ready to insert

his penis into her husband's rectum but she could not tell whether Smith actually raped James (T. Tr. 489-90). Deborah later observed Penson urinating on James' back (T. Tr. 490-91). Eventually, Penson took her into the bathroom and forced her to shower after which he inserted his finger into her vagina. Penson then took her back into the bedroom and forced her to commit fellatio on her husband (T. Tr. 491-93). Brooks was told to kill her and James and put pillows over their heads as they laid face down on the bed. Brooks told them that he had to kill them but was unable to do so and left the apartment after telling them to count to 2,000 (T. Tr. 493-96). Deborah stated on cross-examination that she had no trouble identifying Brooks because she "was looking dead at that man's face when he was raping me" and knew without a doubt that he was the man (T. Tr. 528-29).

State's Exhibit 1, a certified copy of the termination entry in Case Number 75-CR-144, *State* v. *Steven Penson*, and State's Exhibit Number 2, a certified copy of the plea entry showing that Penson had pled guilty to Felonious Assault in Case Number 75-CR-144, were introduced into evidence through the testimony of Richard Horn, Deputy Clerk with the Montgomery County Court of Common Pleas (T. Tr. 180-82).

Officer Michael Tenore of the Dayton Police Department was called as a witness on behalf of John Smith. Officer Tenore spoke with Mary and Deborah Jones at Good Samaritan Hospital on the morning of the rapes. Mary had told him that someone had held a flashlight in her face and she could not see who else was in the house. Officer Tenore stated that Deborah did not give him a description or name of any assailant but she did agree with the description given to him by James Jones (T. Tr. 563-64).

Officer Tenore had testified for the State at the suppression hearing and he testified at that hearing about the procedures utilized when James and Deborah identified John Smith's picture out of a photospread (State's Exhibit 1; Supp. Tr. 12-16).

Officer Tenore also stated during the suppression hearing that Deborah and Mary were extremely upset at the hospital and he did not question them much but got most of his information from Mr. Jones (Supp. Tr. 26).

Detective Claudette Ison of the Dayton Police Department was called as a witness on behalf of Richard Brooks. Detective Ison stated that she sent pubic hair samples taken from each of the defendants to the Miami Valley Regional Crime Lab for analysis but was unable to testify to the results (T. Tr. 565-67).

Detective Ison testified for the State at the suppression hearing concerning the procedures utilized when Mary Jones picked John Smith's picture out of a photospread as one of her attackers (State's Exhibit 1; Supp. Tr. 28-29). She also described how James and Deborah Jones separately picked Richard Brooks' picture out of a photospread (State's Exhibit 3; Supp. Tr. 29-31; 47-48) and how James, Deborah and Mary Jones separately picked Penson's picture out of a photospread (State's Exhibit 2; Supp. Tr. 31-32; 61-63; 64-66).

John Smith testified in his own behalf, stating that he had never been to the Jones's apartment at 1947 Fairport Avenue and that he had never seen any of the Jones family until he saw them in court (T. Tr. 570-72).

Steven Penson testified in his own behalf, admitting that he knew James and Deborah Jones but denying any involvement in the crimes (T. Tr. 574-77; 581). Penson testified that he was at a girl friend's house from approximately 11:30 p.m. on August 3 to about 6:00 a.m. on August 4, 1984 (T. Tr. 578-80).

Richard Brooks testified in his own behalf likewise denying any involvement in the crimes. Brooks stated that he was at Penson's house on the night of August 3, 1984 and that he went to bed after Penson left at around 11:30 p.m. Brooks testified that he was awakened around 1:00 a.m. the next

morning by his sister Connie beating on the front door. After talking to Connie for a while, Brooks went back to bed and slept until sometime during the next afternoon (T. Tr. 587-89).

SUMMARY OF ARGUMENT

In *Strickland* v. *Washington*, 466 U.S. 668 (1984), this Court set standards for evaluating claims of ineffective assistance of counsel at trial. The standard adopted in *Strickland* provides a fair and logical framework for judging such claims at trial and would be equally well-suited for analyzing claims of ineffective assistance of counsel on a direct appeal as of right. The present case provides an opportunity to apply the *Strickland* standard in a case involving allegations of deficient performance on the part of court-appointed appellate counsel and also provides the opportunity to apply a single uniform standard in evaluating ineffective assistance of counsel claims on direct appeal without regard to whether counsel is retained or appointed.

This case also poses the question of whether a claim of ineffective assistance of appellate counsel can be subject to a harmless error analysis. A claim of ineffective assistance of court-appointed appellate counsel based upon counsel's refusal, after thorough examination of the record, to file what he considered to be a meritless brief, should be subject to analysis under the harmless error doctrine of *Chapman* v. *California*, 386 U.S. 18 (1967).

ARGUMENT

I. THE PETITIONER CANNOT ESTABLISH HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL WHERE HE HAS FAILED TO POINT TO SPECIFIC ERRORS OR OMISSIONS MADE BY HIS APPELLATE COUNSEL WHICH SHOW, IN LIGHT OF ALL THE CIRCUMSTANCES, THAT HIS APPELLATE COUNSEL'S PEFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS AND WHICH ESTABLISH A REASONABLE PROBABILITY THAT, BUT FOR HIS APPELLATE COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

The Petitioner argues that he was denied equal protection, due process and the effective assistance of counsel on direct appeal because his appellate counsel failed to strictly comply with the requirements set forth by this Honorable Court in *Anders* v. *California*, 386 U.S. 738 (1967). Petitioner further argues that his appellate counsel's failure to file a brief constituted a constructive denial of counsel with the result that prejudice need not be shown.

In *Anders*, this Court held that when an attorney appointed to represent an indigent defendant on direct appeal finds his client's case to be wholly frivolous after a conscientious examination of the record, he should so advise the court and request permission to withdraw from the case. The Court noted that the request to withdraw should be accompanied by a brief referring to anything in the record that might arguably support the appeal and that a copy of the brief should be furnished to the defendant in order to allow him to raise any points he might choose. The appellate court would then undertake a full examination of the record to determine whether the case was wholly frivolous. If the court then found any points arguable on their merits, it should afford the

indigent defendant the assistance of counsel to argue the appeal. 386 U.S. at 744. The Court noted that this procedure was designed to afford an indigent defendant opportunities on appeal that were enjoyed by defendants with retained counsel and further stated that "such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled." *Id.*, at 745.

Thus, the *Anders* procedures established a "prophylactic framework" that was designed to protect the constitutional requirements of substantial equality and fair process. *Pennsylvania* v. *Finley*, 481 U.S. ____, 107 S.Ct. 1990, 1993 (1987). It is respectfully submitted that the *Anders* procedures are not an end unto themselves, resolutely inflexible, but are merely a means of achieving the constitutional commands of equality and fundamental fairness in the criminal appellate process. While the goal sought to be achieved by the *Anders* procedures is the substantial equality of representation of indigent and non-indigent defendants on appeal, in actual practice *Anders* has created a dual standard of representation of criminal defendants on direct appeal. Appointed counsel on appeal often find it less burdensome to file a brief raising one or two frivolous issues for the appellate court to digest rather than attempting to comply with the *Anders* procedures in withdrawing from an appeal which they consider to be without merit. Such concerns are reflected in the opinion written by Justice (then Judge) Stevens in *Nickols* v. *Gagnon*, 454 F.2d 467, 472 (7th Cir. 1971), *cert. denied* 408 U.S. 925 (1972), where he stated:

> If retained counsel are effective advocates and attentive to their professional responsibilities, they will seldom advance contentions that are groundless. The mere fact that such a lawyer is making an argument should indicate that it has sufficient substance to merit the court's attention. If appointed counsel were obligated in every case to make arguments that amount to little more than meaningless charades, a subtle but invidious distinction between appointed and retained counsel might develop. The indigent, unlike the nonindigent defendant, would lose the benefit of retained counsel's implicit representation to the court that he believes in the legal substantiality of the contentions advanced.
>
> (Footnotes omitted).

Anders was decided seventeen years before this Court set forth the current standards for judging the effectiveness of counsel in *United States* v. *Cronic*, 466 U.S. 648 (1984) and *Strickland* v. *Washington*, 466 U.S. 668 (1984) and eighteen years before this Court held that due process of law guarantees a criminal defendant the effective assistance of counsel on a first appeal as of right in *Evitts* v. *Lucey*, 469 U.S. 387 (1985).

In *Strickland* v. *Washington*, supra, this Court held that where a convicted defendant claims that his trial counsel's performance was so deficient as to require reversal of his conviction, he must first show that, in light of all the circumstances, counsel's performance fell below an objective standard of reasonableness. 466 U.S. at 687-88. In this particular regard, this Court noted that a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. In addition, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 689-94. Thus, under *Strickland*, the test for ineffective assistance of counsel requires a showing of both deficient performance and resulting prejudice, the same as in Ohio under *State* v. *Lytle*, 48 Ohio St. 2d 391 (1976).

In *United States* v. *Cronic*, supra, this Honorable Court noted that some situations do exist where prejudice need not be shown by an accused, the most obvious of which being the

complete denial of counsel or the denial of counsel at a critical stage of trial. 466 U.S. at p. 658-59 and n.25. This Court cited *Davis* v. *Alaska*, 415 U.S. 308 (1974), where the accused was denied the right to effective cross-examination, and *Powell* v. *Alabama*, 287 U.S. 45 (1932), "a case in which the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into actual performance at trial," as being representative of situations where prejudice need not be proven by the defendant. *Id.*, at p. 659-61. But this Court also went on to state that "[a]part from circumstances of that magnitude, however, *there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt*. See *Strickland* v. *Washington*, 466 U.S. at 693-696, 104 S.Ct. at 2067-2069." *Id.*, at p. 659-60, n.26 (Emphasis added; citations omitted). This Court also noted that, in the absence of extraordinary circumstances such as those found in the *Davis* and *Powell* cases, in its evaluation of ineffective assistance of counsel claims:

> [W]e begin by recognizing that the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. *Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated. Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, the burden rests on the accused to demonstrate a constitutional violation.*

Id., at p. 658 (Emphasis added; citations and footnotes omitted).

In *Evitts* v. *Lucey*, supra, this Court decided that a first appeal as of right "is not adjudicated in accord with due process of law if the appellant does not have the effective

assistance of an attorney." 469 U.S. at 396 (Footnote omitted). In *Evitts* this Court noted that the district court's finding that the petitioner received ineffective assistance of counsel on appeal was uncontested by the parties. Thus, the Court found it unnecessary to "decide the content of appropriate standards for judging claims of ineffective assistance of appellate counsel." *Id.* at p. 392. However, in *Smith* v. *Murray*, 477 U.S. ____, 106 S.Ct. 2661 (1986), this Court applied the test of *Strickland* v. *Washington*, supra, to a claim involving the ineffective assistance of appellate counsel. In *Smith* v. *Murray*, the Court held that the habeas corpus petitioner had defaulted his underlying constitutional claim as to the admission of a psychiatrist's testimony at the sentencing phase of his capital murder trial since his appellate counsel had not raised the issue on direct appeal as required by Virginia law. The Court stated: "Nor can it seriously be maintained that the decision not to press the claim on appeal was an error of such magnitude that it rendered counsel's performance constitutionally deficient under the test of *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)". *Smith*, supra at p. 2667. The Court then went on to elaborate:

> It will often be the case that even the most informed counsel will fail to anticipate a state appellate court's willlingness to reconsider a prior holding or will underestimate the likelihood that a federal habeas court will repudiate an established state rule. But, as *Strickland* v. *Washington* made clear, "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." 466 U.S., at 689, 104 S.Ct., at 2065. Viewed in light of Virginia law at the time Mr. Pugh submitted his opening brief to the Supreme Court of Virginia, the decision not to pursue his objection to the admission of Dr. Piles' testimony fell well within the

> "wide range of professionally competent assistance" required under the Sixth Amendment to the Federal Constitution. *Id.*, at 690, 104 S.Ct., at 2066.

Id., at p. 2667.

Thus, the Respondent would respectfully submit that the *Strickland* test for evaluating claims involving the effectiveness of counsel at the trial stage applies equally to claims involving the effectiveness of counsel on a first appeal as of right. Accord, *Lockhart* v. *McCotter*, 782 F.2d 1275, 1283 (5th Cir. 1986), *cert. denied* ____ U.S. ____, 93 L.Ed. 2d 827 (1987); *Griffin* v. *West*, 791 F.2d 1578, 1582-83 (10th Cir. 1986).

The Petitioner relies upon *Evitts*, *Strickland* and *Cronic* and argues that prejudice should be presumed in his case because the circumstances surrounding his appeal amounted to a constructive denial of counsel. In *Strickland*, the Court noted that prejudice is properly presumed in cases of actual denial of counsel or where there is state interference with counsel's assistance to his client. The Court also noted that one type of actual ineffectiveness claim served to invoke "a similar, though more limited, presumption of prejudice." 466 U.S. at 692. The Court cited *Cuyler* v. *Sullivan*, 446 U.S. 335, 345-50 (1980), as a case where prejudice would be presumed only if the defendant could demonstrate that his counsel actively represented conflicting interests and that such actual conflict of interest adversely affected his lawyer's performance. *Id.* The *Strickland* Court then went on to note that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." 466 U.S. at 693.

In the present case, the record shows that on January 8, 1985, Douglas Shaeffer was appointed to represent the Petitioner on his direct appeal to the Court of Appeals of Montgomery County, Ohio. Pursuant to Mr. Shaeffer's request, all

of the proceedings relating to Petitioner's trial were transcribed and made a part of the record on appeal. Once the complete record was filed in the court of appeals, Mr. Shaeffer was granted several extensions of time by the court of appeals in which to file a brief on behalf of the Petitioner. On June 2, 1986, Mr. Shaeffer filed a Certification of Meritless Appeal certifying to the court of appeals that he had carefully reviewed the record on appeal and had found no errors requiring reversal of the Petitioner's jury trial convictions and/or the trial court's sentence in the case and moved to withdraw as counsel of record on the appeal (J.A. 35-36).

It has not been suggested in this case that Mr. Shaeffer was laboring under any sort of conflict of interest nor has it been suggested that there was any state interference with Mr. Shaeffer's handling of the appeal. Thus, the Respondent would respectfully submit that this case, like the situations presented in *Strickland* and *Cronic*, is a case where prejudice must be demonstrated by the Petitioner and is not a case where prejudice should be presumed. The current case, where it is alleged that appointed counsel and the appellate court failed to strictly comply with *Anders* procedures, should be treated like the actual ineffectiveness of counsel case as set forth in *Strickland*. In *Anders*, the Court established a procedural mechanism which was designed to assist in achieving the goal of substantial equality and fundamental fairness in the criminal appellate process. These goals would be best achieved by applying a single, uniform standard for judging the effectiveness of counsel in all criminal appeals as of right, regardless of whether counsel is appointed or retained. Since all criminal defendants, whether represented by appointed or retained counsel, are entitled to the effective assistance of counsel on a direct appeal as of right, *Evitts*, supra, 469 U.S. at 395-96, there is no logical reason for applying a different standard for judging the effectiveness of an attorney on appeal based solely upon his status as appointed rather than retained. The application of the *Strickland* standard to all such appeals would be readily workable in the appellate context

because the reviewing court would have the benefit of a fully developed trial record before it which would enable it to evaluate a claim of ineffective assistance just as the Court was able to do in *Strickland*. 466 U.S. at 698-701. To ignore this trial record in evaluating such a claim, as the Petitioner would have the Court do in this case, would be to ignore the fact that " '[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote *the ultimate objective that the guilty be convicted and the innocent go free.*' " *Kimmelman* v. *Morrison*, 477 U.S. ____, 106 S.Ct. 2574, 2594 (1986) (Powell, J., Concurring), quoting *Evitts* v. *Lucey*, supra, 469 U.S. at 394 and *Herring* v. *New York*, 422 U.S. 853, 862 (1975) (emphasis in the former). As Justice Powell went on to note in *Kimmelman*, "[t]he right to effective assistance of counsel flows logically from this premise. But it would shake that right loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall." *Id.*, at 2595.

Clearly, due process of law entitled the Petitioner to the effective assistance of counsel on a first appeal as of right. *Evitts* v. *Lucy*, supra, 469 U.S. at 396. Just as clearly, however, Petitioner was not entitled to compel his court appointed appellate counsel to press nonfrivolous points requested by Petitioner when counsel, as a matter of professional judgment, decided not to press those points. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). In the instant case, Petitioner's court appointed appellate counsel clearly did, according to his Certification of Meritless Appeal (J.A., p. 35-36), conduct a careful examination of the record on appeal and found no errors justifying reversal or modification of Petitioner's conviction and sentence. In light of the foregoing, it is clear that Petitioner's court appointed appellate counsel did render some representation to Petitioner, and thus the real issue in the instant cause involves the effectiveness of the representation rendered by Petitioner's court appointed appellate

counsel, and not whether Petitioner was represented by counsel at all.

Under the *Strickland* test, Petitioner has clearly failed to demonstrate that he was prejudiced by the manner in which his first appeal as of right was handled. Noticeably absent from Petitioner's Petition for Writ of Certiorari or his Brief is even an attempt by Petitioner to point to any error in the trial record which, but for appellate counsel's failure to raise, would have resulted in a reasonable probability that the outcome of the proceeding (i.e. appeal) would have been otherwise. The Respondent would suggest that this amounts to a tacit admission by the Petitioner that he has suffered no prejudice in this case. Regardless of which attorney may have represented him in the appeal of his conviction, at some point in time that attorney would have to point to specific errors in the record in order to obtain further relief for the Petitioner in this case. The record herein shows that the Petitioner obtained the same result from his appeal as did his co-defendants (Brooks and Smith) and further shows, upon careful examination, that he is entitled to no additional relief. The record in the instant case reveals that the evidence against the Petitioner was overwhelming. Detective Ison testified at the suppression hearing that all three of the victims (James, Deborah and Mary Jones) separately picked Petitioner's picture out of the photospread (State's Exhibit 2) as one of the perpetrators of the instant offenses (Supp. Tr. 31-32; 61-63; 64-66). Moreover, both James and Deborah Jones testified that they had known the Petitioner previously (Supp. Tr. 104; 126-31; T. Tr. 197-98; 481-82). In addition, Petitioner's fingerprints were discovered in the bedroom of the Jones' apartment (T. Tr. 437-39; 447-50). Finally, it should be noted that the evidence adduced at trial is generally uncontradicted and unrefuted inasmuch as the theory of defense presented by all of the Defendants was basically one of denial and mistaken identification.

Based upon the record in the case *sub judice*, as applied against the stringent standard for judging the effectiveness of

counsel set forth in *Strickland* v. *Washington*, supra, and *Smith* v. *Murray*, supra, it is clear that the Montgomery County Court of Appeals was correct in its decision that Petitioner suffered no prejudice by his appellate counsel's filing of an *Anders* brief or by the appellate court's handling and disposition of the appeal.

II. AN ALLEGED CONSTITUTIONAL VIOLATION WHICH IS BASED UPON THE FILING OF AN INADEQUATE *ANDERS* BRIEF BY COURT-APPOINTED COUNSEL ON DIRECT APPEAL IS SUBJECT TO HARMLESS ERROR ANALYSIS PURSUANT TO *CHAPMAN* V. *CALIFORNIA*, 386 U.S. 18 (1967).

Assuming *arguendo* that a constitutional violation occurred in the handling of the Petitioner's direct appeal, Respondent would strongly contend that a review of the record in this case clearly establishes that any such error was harmless beyond a reasonable doubt. In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court held that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the basis of the entire record, that the constitutional error was harmless beyond a reasonable doubt. Unlike the *Strickland* test, of course, the state has the burden of proof to show that a constitutional violation is harmless and the state must prove its burden beyond a reasonable doubt.

In this case, the court of appeals held, after a thorough examination of the trial record, that the Petitioner suffered no prejudice in the handling of his appeal (J.A., p. 40-41). Such a finding is the clear equivalent of a holding that any error which occurred in the Petitioner's appeal was indeed harmless. Thus, the critical question for this Court to decide is whether or not harmless error analysis is appropriate in a case such as this. The recent decisions of this Court offer strong support for the proposition that harmless error analysis

is appropriate in a case involving an alleged Sixth Amendment violation of the right to counsel on direct appeal. As previously noted, this is *not* a case where no counsel was appointed to represent the Petitioner on appeal. Petitioner's appointed counsel acted to ensure that the complete record of the proceedings in the trial court was transcribed and made a part of the record on appeal. This enabled the court of appeals to fully examine the record "to determine whether the defendant was accorded a fair trial and whether any grave or prejudicial errors occurred therein." (J.A., p. 40).

In *Delaware* v. *Van Arsdall*, 475 U.S. ____, 106 S.Ct. 1431 (1986), the Court refused to apply a *Strickland* type outcome determinative prejudice test to a confrontation clause violation, noting that:

> [w]hile some constitutional claims by their nature require a showing of prejudice with respect to the trial as a whole, see, e.g., *Strickland* v. *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984) (ineffective assistance of counsel), the focus of the Confrontation Clause is on individual witnesses. Accordingly, the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.

106 S.Ct. at 1436.

Although the Court refused to apply a *Strickland* type prejudice test in *Van Arsdall*, it did hold that the confrontation clause violation was subject to harmless error analysis.

In *Rose* v. *Clark*, 478 U.S. ____, 106 S.Ct. 3101 (1986), the Court held that a jury instruction which erroneously shifted the burden of proof on the issue of malice in violation of the *Sandstrom* rule (*Sandstrom* v. *Montana*, 442 U.S. 510 (1979)) was subject to harmless error analysis. In its discussion on the harmless error doctrine, the Court noted a variety of situations where the harmless error rule had been applied, e.g., *Rushen* v. *Spain*, 464 U.S. 114, 118 (1983) (*per curiam*)

(denial of right to be present at trial); *Moore* v. *Illinois*, 434 U.S. 220, 232 (1977) (admission of witness identification obtained in violation of right to counsel); and *Milton* v. *Wainwright*, 407 U.S. 371 (1972) (admission of confession obtained in violation of right to counsel). 106 S.Ct. at 3105. The Court noted in *Clark* that harmless error analysis presupposes a trial at which the defendant is represented by counsel before an impartial adjudicator and is allowed to present evidence and argument. While the Court acknowledged that there are some errors, such as those which abort the basic trial process or deny it altogether, which can never be harmless, these errors are the exception and not the rule. *Id.*, at 3106 and n.6. The Court then went on to state:

> Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis. The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead to fair and correct judgments. *Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed.* As we have repeatedly stated, "the Constitution entitles a criminal defendant to a fair trial, not a perfect one."

Id., at 3106-07 (emphasis added; citations omitted).

In holding that the *Sandstrom* error did not preclude the application of the harmless error doctrine, the Court reasoned:

> Unlike errors such as judicial bias or denial of counsel, *the error in this case did not affect the composition of the record*. Evaluation of whether the error prejudiced respondent thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. *Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.*

106 S.Ct. at 3107, n.7 (emphasis added; citations omitted).

This Court is faced with precisely the same situation in the case at hand. With the aid of a fully developed trial record before it, there is no inherent difficulty for this Court in determining the presence or absence of prejudice in this case. Therefore, the Respondent would respectfully contend that this is indeed a proper case for the application of the harmless error doctrine and that, when the doctrine is applied to the record in this case, it is clear that the alleged constitutional violation is harmless beyond a reasonable doubt.

CONCLUSION

For the stated reasons, the Respondent, State of Ohio, requests that the judgment of the Court of Appeals of Montgomery County, Ohio be affirmed.

Respectfully submitted,

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